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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1118

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER

v.

MARY JO DICKEN AND ELIZABETH M. DICKEN, B. M. MURRAY, EXECUTOR OF THE ESTATE OF EMMA GANG, DECEASED, JACOB E. SANDUSKY, SHERIFF

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Paul A. Porter, Administrator of the Office of Price Administration, petitioner herein, prays that a writ of certiorari issue (1) under Section 240 (a) of the Judicial Code to review the judgment of the District Court for the Southern District of Ohio in the above-entitled case entered March 26, 1946, dismissing a suit for injunction, now pending on appeal in the United States Circuit Court of Appeals for the Sixth Circuit, and (2) under Section 240 (a), and, in the alternative, Section 262 of the Judicial Code to review an order of the United States Circuit Court of Appeals for the Sixth Circuit, entered on April

5, 1946, denying an application by the petitioner for a temporary injunction pending the determination of an appeal from the order of the District Court.

OPINIONS BELOW

The opinion of the District Court (R. 16–25) has not yet been reported. The Circuit Court of Appeals did not render an opinion.

JURISDICTION

The judgment of the District Court was entered on March 26, 1946 (R. 33), and the order of the Circuit Court of Appeals denying an injunction pending appeal on April 5, 1946 (R. 46). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and, in the alternative, under Section 262 of the Judicial Code.

QUESTIONS PRESENTED

1. Whether Section 265 of the Judicial Code prohibits a District Court from issuing an injunction under Section 205 (a) of the Emergency Price Control Act to restrain eviction of a tenant pursuant to an order of a state court, although such eviction would violate that Act and the Rent Regulation for Housing issued thereunder.

2. Whether the Circuit Court of Appeals abused its discretion in refusing to issue an injunction to maintain the *status quo* pending appeal in view

of its dismissal as moot of another and similar case after the tenant had been evicted subsequent to the denial of an injunction pending appeal.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are Section 265 of the Judicial Code (28 U. S. C. 379), the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. Sec. 901, *et seq.*, as amended) and Rent Regulation for Housing, as amended (10 F. R. 3436) issued under that Act. Section 265 is set forth in the Appendix, *infra*, p. 19. The provisions of the Price Control Act and of the Regulation are set forth in Appendix to the petition for certiorari in *Porter* v. *Lee*, Nos. 1116–1117.

STATEMENT

This case is brought here along with *Porter* v. *Lee*, Nos. 1116–1117, which involves the same problem and which ties into the present case in a manner to be described.

Section 6 of the Rent Regulation for Housing provides that no tenant shall be removed or evicted (except on grounds none of which is or was present in this case) unless, on petition, the Administrator of the Office of Price Administration issues a certificate authorizing the eviction.[1] Violation of these Regulations is forbidden by Section

[1] The validity of this provision is not challenged, nor could it be attacked in this proceeding. *Yakus* v. *United States*, 321 U. S. 414; *Bowles* v. *Willingham*, 321 U. S. 503.

4 (a), and Section 205 empowers the Administrator to seek injunctive relief against such violations.

This is a suit for an injunction by the Administrator of the Office of Price Administration to restrain an eviction of a tenant in violation of this provisions (R. 1–3). As appears from a stipulation as to the facts (R. 14–15), the tenant is in possession of a house located within the Columbus Defense Rental Area which was owned by the Estate of Emma Gang, deceased. The house was sold by her Executor, respondent B. M. Murray, pursuant to authority granted by an order of the Probate Court of Franklin County, Ohio. After the sale, the purchasers, the respondents, Mary Jo Dicken and Elizabeth M. Dicken, obtained *ex parte* from the Probate Court a writ of possession directing respondent Jacob E. Sandusky as Sheriff of Franklin County to evict the tenant and to place the purchasers in possession. No certificate was applied for or obtained from the Administrator of the Office of Price Administration authorizing the eviction as required by the Rent Regulation. While the writ was in the hands of the Sheriff for eviction the Administrator brought this action against the owners, the executor and the Sheriff to restrain the eviction (R. 26). On March 26, 1946, the District Court, after issuing a temporary injunction (R. 9–10, 30–31), dismissed the suit for injunction on the ground that Section 265 of the Judicial Code (28 U. S. C. § 379) barred the relief sought (R. 27–28).

The District Court, however, entered an order restraining the defendants from evicting the tenant pending determination by the Circuit Court of Appeals of an application for an injunction prohibiting the eviction pending an appeal to that Court (R. 37–38). Notice of appeal was filed March 26, 1946 (R. 34), and on the same day an application for an injunction to restrain eviction of the tenant pending the appeal was filed in the Circuit Court of Appeals for the Sixth Circuit (R. 42–43). This application was denied on April 5, 1946 (R. 46), thus removing all obstacles to the eviction of the tenant by the Sheriff. The Circuit Court of Appeals has not yet heard the case on the merits.

Three days later, on April 8, 1946, the same Circuit Court of Appeals dismissed, on the ground of mootness, appeals by the Administrator in *Porter* v. *Lee*, Nos. 10,007 and 10,079, from similar denials by a District Court of injunctions to restrain eviction, where, subsequent to the decision of the District Court, the tenant had moved out of the premises under threat of forcible eviction. There too the District Court had denied the Administrator relief because of an asserted lack of jurisdiction, and the Circuit Court of Appeals had denied the Administrator a stay pending appeal from the first of the two orders there involved before the tenant was evicted. A petition for writs of certiorari in the *Lee* cases is being filed together with this petition.

In order to prevent the eviction of the tenant in this case, an application for an injunction restraining the eviction pending the determination of this petition for a writ of certiorari, and if certiorari be granted, pending the final disposition of the case by this Court, was made to and granted by Mr. Justice Reed on April 10, 1946.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals for the Sixth Circuit erred in denying an injunction to restrain the eviction of the tenants pending its decision on the appeal from the District Court's decision.

2. The District Court erred in dismissing this action on the ground that Section 265 of the Judicial Code prohibited it from issuing an injunction under Section 205 (a) of the Emergency Price Control Act, restraining the eviction of a tenant pursuant to an order of a state court, although such eviction would violate the Federal Act and the Rent Regulation for Housing issued thereunder.

REASONS FOR GRANTING THE WRIT

1. The decisions (1) of the District Court dismissing the suit for injunction, (2) of the Circuit Court of Appeals denying the stay pending appeal, and (3) of the Circuit Court of Appeals three days later in the *Lee* cases dismissing appeals as moot where a tenant has moved out pending the appeal, make it impossible for the Government to

use the federal courts in the Sixth Circuit to protect tenants from illegal eviction proceedings in state courts. The two decisions of the Circuit Court of Appeals make it impossible for the Administrator to secure a review by that court of any District Court's decision denying an injunction against proceedings in a state court. In each case where an injunction is denied by the District Court, and a restraining order pending appeal denied by the Circuit Court of Appeals, the landlord is free to evict the tenant and the case will then, under the *Lee* ruling, be deemed moot by the Circuit Court of Appeals. In these circumstances, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. The resulting impairment of the Administrator's power to prevent unlawful evictions presents a question of importance in the administration of the Emergency Price Control Act. That effective control over rents necessitates control over evictions was recognized by Congress in the Price Control Act when it granted the Administrator power to prevent evictions as well as authority over rents, and also by this Court during an earlier but similar emergency in *Block* v. *Hirsch*, 256 U. S. 135, 157–158, when it said: "If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail."

The machinery for eviction of tenants is provided by the State and is summary in character and operation. In order to prevent unlawful evictions and other violations of the rent regulations the Administrator has often found it necessary to apply for injunctions in Federal District Courts.

As Judge Parker stated in *Brown* v. *Wright*, 137 F. 2d 484, 488 (C. C. A. 4):

> If the Administrator were denied injunctive relief from threatened violation because of the pendency of state court proceedings and were required to intervene in such proceedings for relief, resulting delays might well render the Act nugatory in states not in sympathy with the legislation. The federal government is not so impotent that it must depend upon instrumentalities of the states for the enforcement of legislation so vital; * * *

If the Administrator is unable to apply to the federal courts for relief a great measure of protection will have been removed in one of the most critical fields at present under price control. It is common knowledge that the shortage in housing has increased, not decreased, since the war. In his report to the President, Wilson W. Wyatt, the Housing Expediter, stated (p. 3):

> In October 1945, 1,200,000 families were living doubled up with other families. At that time the situation was critical. It is rapidly becoming worse. The following

table shows with shocking clarity that even without reducing the number of families which were doubled up in October 1945, we would have to build approximately 3,000,000 new homes by the end of 1945 just to keep the situation from becoming worse.

The pressure for evictions indicated by the applications for and notices of eviction, now being received by the Administrator at the rate of 1,250,000 per year, shows the grave dangers to the rent control system which any impairment of the Administrator's control over evictions would involve.[2]

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[2] The following table shows the number of eviction certificates (required under section 6 (b) of the regulation before a tenant may be evicted), requested since 1943. The number of eviction notices (required under Section 6 (a) of the regulation before a tenant may be evicted), received since 1943 is also given. It will be noticed that in the first two months of 1946 more eviction certificates were requested than in the entire second half of 1943.

EVICTION CERTIFICATES

	Requested		*Requested*
1st half 1943	41,314	1st half 1945	143,391
2nd half 1943	73,831	2nd half 1945	150,357
1st half 1944	103,318	2 mos. 1946	76,428
2nd half 1944	116,004		

EVICTION NOTICES

	Receipts		*Receipts*
1st half 1943	254,980	1st half 1945	381,252
2nd half 1943	318,600	2nd half 1945	382,458
1st half 1944	386,867	2 mos. 1946	139,654
2nd half 1944	386,629		

Derived from: Statistical Report of OPA Area Office Operations, 1943–1944; Summary Rent Operating Report 1945–1946.

If a remedy against unlawful state action is denied the Administrator in the federal courts it is evident from the pressure for housing and the huge volume of evictions at present that the number of illegal evictions will be greatly increased.

3. The denial by the Circuit Court of Appeals of the injunction pending the appeal to that court was an abuse of discretion because if the tenant were evicted before the appeal could be heard this would mean that the landlord had accomplished his unlawful objective and the tenant suffered the injury the regulation was intended to avert, and because, if that court adheres to its rule in the *Lee* cases, no review of the district court's decision would be possible in the Circuit Court of Appeals at all.

The Court is respectfully referred to pp. 11–12 of our petition in the *Lee* cases, in which the same point is raised, for an amplified statement as to why the denial of a restraining order pending appeal in these circumstances is an abuse of discretion.

Correction by this Court on certiorari of the error of the Sixth Circuit Court of Appeals in holding the *Lee* cases moot will not alone afford effective relief. Such a disposition would merely require the Circuit Court of Appeals to hear both the *Lee* cases and the instant case on the merits. But in all likelihood the tenant here would have been forced out of the premises in the meantime.

The major harm in an eviction proceeding is done when the tenant is dispossessed from the premises. In the acute housing shortage that now exists it is almost impossible for a tenant to find new quarters and hardship inevitably ensues. Furthermore, the power of this Court ultimately to order reinstatement in vacated premises months later obviously does not safeguard tenants, inasmuch as the original removal causes the most serious injury whether or not a subsequent offer of reinstatement is required. The result will normally be that the landlord has accomplished his unlawful purpose, and the purpose of the Act and the Regulations have been frustrated.

This Court has power under Section 240 (a) of the Judicial Code to review the denial by the Circuit Court of Appeals of a temporary injunction pending appeal. The "power to grant writs of certiorari extends to interlocutory as well as final decrees". *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, p. 202. We think that the circumstances of this case, coupled with the decision in the *Lee* cases, are sufficiently extraordinary to warrant review of the interlocutory order. If there should be any question as to this Court's power to review the order on certiorari under Section 240 (a), the case is an appropriate one for the issuance of a writ of certiorari under Judicial Code, Section 262, in order to protect

the appellate jurisdiction of this Court. For if the eviction is not stayed pending appeal, this court in the exercise of its ordinary appellate jurisdiction would be precluded from giving effective relief, a result which in substance denies the Administrator his right to appeal. *Cf. House* v. *Mayo*, 324 U. S. 42, 44; *In re 620 Church Street Corp.*, 299 U. S. 24, 26; *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 25–26; *United States Alkali Association* v. *United States*, 325 U. S. 196, 201–204; *Ex parte Peru*, 318 U. S. 578, 582–585. And, in *House* v. *Mayo*, *supra*, the Court stated (pp. 44–45):

> * * * And not only does our review extend to a determination of whether the circuit court of appeals abused its discretion in refusing to allow the appeal, but if so, it extends also to questions on the merits sought to be raised by the appeal. * * *

4. In view of the peculiar circumstances (a) whereby the Circuit Court of Appeals would, had the tenant been evicted, have precluded itself from hearing the appeal in this case on the merits, (b) the need for a prompt determination that the district courts have jurisdiction to enjoin unlawful state court eviction proceedings, (c) the conflict discussed below between the district court ruling and decisions of this Court, of two circuit courts of appeals, and of many district courts, and (d) the fact that a related question is before this Court in the *Lee* cases, in which certiorari is sought

after the judgment of the Circuit Court of Appeals, we believe this an appropriate case for the Court to review the decision of the District Court before judgment in the Circuit Court of Appeals, as permitted by Section 240 (a).[3]

The holding of the District Court that Section 265 of the Judicial Code barred it from enjoining the execution of an eviction order of a state court conflicts with the decision of this Court in *Bowles* v. *Willingham*, 321 U. S. 503 (1944). In dealing with that question this Court said (p. 510–511):

> I. We are met at the outset with the question whether the District Court could in any event give the relief which the Administrator seeks in view of § 265 of the Judicial Code (36 Stat. 1162, 28 U. S. C. § 379) which provides that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases

[3] This Court has granted certiorari before judgment in the Circuit Court of Appeals where that court has previously indicated its disposition of a case (*Fetters* v. *United States*, 283 U. S. 638, 641), where a similar question is already pending before this Court in another case (Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, pp. 205, 621, and cases cited), and where the point is of great importance requiring prompt settlement in the interest of the public (*id.*, at 205–6, 621–2). This case falls within all three categories, the first two because of the disposition by the court below of the *Lee* cases and the fact that they are now before this Court, and the third because of the box in which the *Lee* cases and the denial of a stay have placed tenants in the Sixth Circuit during this critical housing period.

where such injunction may be authorized by any law relating to proceedings in bankruptcy." *We recently had occasion to consider the history of § 265 and the exceptions which have been engrafted on it. Toucey v. New York Life Ins. Co., 314 U. S. 118. In that case we listed the few Acts of Congress passed since its first enactment in 1793 which operate as implied legislative amendments to it. 314 U. S. pp. 132–134. There should now be added to that list the exception created by the Emergency Price Control Act of 1942. By § 205 (a) the Administrator is given authority to seek injunctive relief in the appropriate court (including the federal district courts) against acts or practices in violation of § 4, e. g., the receipt of rent in violation of any regulation or order under § 2.* Moreover, by § 204 (d) of the Act one who seeks to restrain or set aside any order of the Administrator or any provision of the Act is confined to the judicial review granted to the Emergency Court of Appeals, which was created by § 204 (c) and to this Court. As we recently held in *Lockerty* v. *Phillips*, 319 U. S. 182, 186, 187, Congress confined jurisdiction to grant equitable relief to that narrow channel and withheld such jurisdiction from every other federal and state court. Congress thus preempted jurisdiction in favor of the Emergency Court to the exclusion of state courts. The rule expressed in § 265 which is designed to avoid collisions between state

and federal authorities (*Toucey* v. *New York Life Ins. Co., supra*) thus does not come into play. The powers of the District Court under § 205 (a) of the Act and § 24 (1) of the Judicial Code are ample authority for that court to protect the exclusive federal jurisdiction which Congress created." [Italics supplied.]

The District Court sought to distinguish the *Willingham* case on the ground that it applied only where a state court was attempting to enjoin the Administrator from acting, and ruled that since 205 (c) of the Act gave "concurrent" jurisdiction to state courts, Section 265 required it to hold that the federal court was not an "appropriate" court in which to institute this proceeding and barred it from granting relief. The *Willingham* case itself places no such limit on the power of the federal court, and there is nothing in the Act to indicate that the exception to Section 265 is so limited. The District Court's endeavor to distinguish the *Willingham* decision on the ground that it involved a case where the state court was deprived of jurisdiction of the proceedings sought to be enjoined and where therefore there was no room within which Section 265 of the Judicial Code could operate, overlooks the fact that this was only one basis for the decision in the *Willingham* case. The other ground was that Section 205 (a) of the Emergency Price Control Act constitutes an implied statutory exception to Section 265. The fact that the Administrator

could also, if he chose, have proceeded in a state court, does not deprive him of his statutory right to resort to the federal court, nor does that fact distinguish the *Willingham* case, since there too the Administrator might have proceeded in a state court.

As the District Court itself admitted, its decision is in direct conflict with decisions of the Fourth and Fifth Circuits. In *Brown* v. *Wright*, 137 F. 2d 484 (C. C. A. 4), the court said (p. 488):

> With respect to section 265 of the Judicial Code, we do not think that section may properly be construed as forbidding the granting of an injunction to restrain interference by state courts with the enforcement of a federal statute by an agency to which Congress has delegated exclusive power to enforce it. * * *
> * * * it is not to be presumed that a general statute limiting the power of federal courts to issue injunctions was intended to apply to such cases. In any event, the provision of the Emergency Rental Control Act should be construed as modifying or creating an exception to the general provisions of the statute. * * *

In *Henderson* v. *Fleckinger*, 136 F. 2d 381 (C. C. A. 5) the court said (p. 382):

> Section 265 of the Judicial Code forbidding the grant of an injunction by a court of the United States to stay proceedings in a state court must be considered as modified by the later provision of Section

> 205 (a) of the Emergency Price Control Act. This latter Act formulated important federal policies, and charged the Administrator with executing them, and armed him with injunction as his main weapon. We do not think it was intended that his use of it is to be denied because a proceeding in a state court is contravening the federal policies. The federal Act, assuming its constitutionality, is a part of the supreme law of the land, and the courts ought to carry it out fully, using the injunctive process it prescribes. * * *

In many instances the district courts have granted injunctions to restrain eviction proceedings in state courts. This was done in *Henderson* v. *Kimmel,* 47 F. Supp. 635 (D. Kans. 1942); *Brown* v. *Wick,* 48 F. Supp. 887 (E. D. Mich., 1943); *Brown* v. *Wood,* 59 F. Supp. 872 (N. D. Cal., 1943); *Bowles* v. *Rocks,* 60 F. Supp. 653 (W. D. Pa. 1945); *Bowles* v. *Hall,* 63 F. Supp. 826 (W. D. Pa 1945); *Bowles* v. *Fontanello,* 3 OPA Op. & Dec. 5119 (W. D. Pa. 1945); *Brown* v. *Wilson,* 1 OPA Op. & Dec. 1791 (W. D. Wash. 1943).

5. The procedure which the Court is requested to follow in this case is similar to that in *Rickert Rice Mills* v. *Fontenot,* 296 U. S. 569, 297 U. S. 110. The district court had there refused to grant an injunction restraining the collection of taxes under the Agriculture Adjustment Act. The Circuit Court of Appeals denied an applica-

tion for an injunction pending appeal. A petition for certiorari was filed in this Court to review both the judgment of the district court and the denial of the temporary injunction by the circuit court of appeals. Certiorari was granted without limitation, the Court issued its own injunction pending appeal, and this Court heard the case on the merits.

CONCLUSION

The Circuit Court of Appeals and District Court have decided questions of importance to the enforcement and administration of the Emergency Price Control Act. The denial of the injunction pending appeal by the Circuit Court of Appeals means that, in all probability, no decision on the merits could be obtained there and is an abuse of discretion calling for the exercise of the supervisory powers of this Court. The decision of the District Court, thus in effect sustained by the Circuit Court of Appeals, conflicts with a decision of this Court and with decisions of other Circuit Courts of Appeal. The decisions below are clearly wrong. For these reasons a writ of certiorari should be granted.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
Office of Price Administration.

APPENDIX

Section 265 Judicial Code (28 U. S. C. 379) reads as follows:

> The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. (Mar. 3, 1911, ch. 231, § 265, 36 Stat. 1162).

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